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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

LISA L. RIGGS,**Plaintiff,****v.****CAROLYN W. COLVIN,
Acting Commissioner of Social
Security,****Defendant.****NO. SACV 13-1496-MAN****MEMORANDUM OPINION****AND ORDER**

On September 24, 2013, plaintiff filed a Complaint seeking review of the denial of her application for disability and disability insurance benefits ("DIB"). (ECF No. 1.) On November 4, 2013, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. (ECF No. 9.) On July 16, 2014, the parties filed a Joint Stipulation, in which plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits; and the Commissioner requests that her decision be affirmed or, alternatively, remanded for further administrative proceedings. (ECF No. 15 at 22-25.) The Court has taken the parties' Joint Stipulation under submission without oral argument.

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SUMMARY OF ADMINISTRATIVE PROCEEDINGS

On May 18, 2010, plaintiff filed an application for DIB. (Administrative Record ("A.R.") 20.) Plaintiff, who was born on October 6, 1970 (*id.* 120),¹ claims to have been disabled since February 16, 2010, as a consequence of: peripheral neuropathy due to chemotherapy; lung restriction; secondary pulmonary hypertension/hypoxemia; left-arm impairment -- tumor resection and radiation age 8; interstitial cystitis due to chemotherapy agents; pain disorder related to tumor resection/neuropathy; gastroparesis; Raynaud's disease; inability to sweat normally/regulate heat; and mild cardiac dysfunction. (*Id.* 145.) Plaintiff has past relevant work experience as a psychologist. (*Id.* 28.)

After the Commissioner denied plaintiff's claim initially and upon reconsideration, plaintiff requested a hearing. (A.R. 20.) On March 6, 2012, plaintiff, who was represented by counsel, appeared and testified at a hearing before Administrative Law Judge Helen E. Hesse (the "ALJ"). (*Id.* 20, 29.) Vocational expert ("VE") Alan Boroskin also testified. (*Id.* 20.) On May 23, 2012, the ALJ denied plaintiff's claim (*id.* 20-29), and the Appeals Council subsequently denied plaintiff's request for review of the ALJ's decision (*id.* 2-7). That decision is now at issue in this action.

SUMMARY OF ADMINISTRATIVE DECISION

In her May 23, 2012 decision, the ALJ found that plaintiff engaged in substantial gainful activity on and after her alleged onset date from February 16, 2010, through May 14, 2010. (A.R. 22). The ALJ also determined that from May 15, 2010, through the date of the decision, plaintiff had not engaged in substantial gainful activity. (*Id.*) The ALJ determined that plaintiff has the severe impairments of history of childhood sarcoma in the left arm; sensory peripheral

¹ On the date the application was filed, plaintiff was 35 years old, which is defined as a younger individual. (A.R. 33); *see also* 20 C.F.R. § 404.1563(c).

1 neuropathy; migraine headaches responsive to prescribed therapy; and somatoform pain disorder.
2 (*Id.*) The ALJ concluded, however, that plaintiff does not have an impairment or combination of
3 impairments that meets or medically equals the listed impairments in 20 C.F.R. part 404, subpart
4 P, appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526). (*Id.* 24.)

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6 After reviewing the record, the ALJ determined that plaintiff has the residual functional
7 capacity ("RFC") to perform the following: lift and carry 20 pounds occasionally and ten pounds
8 frequently; sit for six hours and stand or walk for two hours, with normal workday breaks, in an
9 eight-hour workday; never climb ladders, ropes, or scaffolds; only occasionally climb stairs, bend,
10 stoop, balance, kneel, crouch, and crawl; never perform forceful gripping, grasping, twisting, or
11 turning with the left upper extremity; never work at unprotected heights; avoid concentrated
12 exposure to dust, fumes, gases, and chemicals; never perform jobs requiring hypervigilance; and
13 not be in charge of the safety operations of others. (A.R. 25.) In making this finding, the ALJ
14 considered the medical evidence and opinions of record (*id.* 25-28) as well as the subjective
15 symptom testimony of plaintiff, whom the ALJ found was not credible to the extent her statements
16 were inconsistent with the RFC (*id.* 28). The ALJ gave significant weight to the opinion of the
17 medical expert, Dr. Steven Gerber, who is board certified in internal medicine and cardiovascular
18 disease. (*Id.* 27.) She gave little weight to the opinion of plaintiff's two treating physicians, Dr.
19 Jack S. Gutman, D.O, and Dr. Smita Bhatia, M.D., M.P.H, who began treating plaintiff in 1998, and
20 2006, respectively. (*Id.*)

21
22 Based on the testimony of the VE, the ALJ found that plaintiff was able to perform her past
23 relevant work as a psychologist. (A.R. 28.) Accordingly, the ALJ found that plaintiff was not
24 under a disability from February 16, 2010, through the date of the decision. (*Id.* 29.)

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STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine whether it is free from legal error and supported by substantial evidence in the record as a whole. Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted). The "evidence must be more than a mere scintilla but not necessarily a preponderance." Connett v. Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the record can constitute substantial evidence, only those 'reasonably drawn from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006) (citation omitted).

Although this Court cannot substitute its discretion for that of the Commissioner, the Court nonetheless must review the record as a whole, "weighing both the evidence that supports and the evidence that detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also* Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995).

The Court will uphold the Commissioner's decision when the evidence is susceptible to more than one rational interpretation. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may review only the reasons stated by the ALJ in his decision "and may not affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d at 630; *see also* Connett, 340 F.3d at 874. The Court will not reverse the Commissioner's decision if it is based on harmless error, which exists only when it is "clear from the record that an ALJ's error was 'inconsequential to the ultimate nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (quoting Stout v. Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); *see also* Burch, 400 F.3d at 679.

DISCUSSION

Plaintiff alleges three sources of error. First, plaintiff claims the ALJ erred in evaluating the opinions of her treating physicians, Smita Bhatia, M.D., M.P.H, and Jack H. Gutman, D.O., and the state agency physician, D. Chan, M.D. (Joint Stip. at 3.) Second, plaintiff claims the ALJ erred in her assessment of plaintiff's RFC. (*Id.*) Third, plaintiff claims the ALJ erred in evaluating plaintiff's credibility. (*Id.*)

I. The ALJ Failed to Provide Specific and Legitimate Reasons for Rejecting the Opinions of Plaintiff's Treating Physicians, Drs. Gutman And Bhatia.

A. Legal Standard

An ALJ is obligated to take into account all medical opinions of record. 20 C.F.R. §§ 404.1527(c). It is the responsibility of the ALJ to resolve conflicts in medical testimony and analyze evidence. Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). In the hierarchy of physician opinions considered in assessing a social security claim, the opinion of a treating physician is entitled to greater weight than that of an examining physician, the opinion of an examining physician is entitled to greater weight than that of a non-examining physician, and the weight afforded a non-examining physician's testimony depends on the degree to which he provided supporting explanations for his opinions. Garrison v. Colvin, 759 F.3d 995, 1012 (9th Cir. 2014) (citing Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008)); *see also* 20 C.F.R. § 404.1527(c). Furthermore, the opinions of treating physicians like Drs. Bhatia and Gutman, who have seen plaintiff for more than six and 13 years respectively, are entitled to the greatest weight, because treating physicians are hired to cure and have a better opportunity to know and observe the claimant. Magallanes, 881 F.2d at 751; *see also* 20 C.F.R. § 404.1527(c)(2)(i) ("When the treating source has seen [the plaintiff] a number of times and long enough to have obtained a longitudinal picture of [her] impairment, [the Commissioner] will give

1 the source's opinion more weight than . . . if it were from a nontreating source.").

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3 When a treating or examining physician's opinion is not contradicted by another physician,
4 it may be rejected only for "clear and convincing" reasons. Ghanim v. Colvin, 763 F.3d 1154,
5 1160-61 (9th Cir. 2014); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). When, as here, a
6 treating physician's opinion is contradicted by another doctor -- in this case, Dr. Boroskin, the
7 medical expert who testified at the hearing after reviewing plaintiff's records -- the ALJ may reject
8 the opinion of the treating physician if doing so is supported by "specific and legitimate" reasons
9 identified in the decision and supported by substantial evidence in the record. Ghanim, 763 F.3d
10 at 1161; Garrison, 759 F.3d at 1012; *see also* Ryan, 528 F.3d at 1198.

11
12 "The opinion of a nonexamining physician cannot by itself constitute substantial evidence
13 that justifies the rejection of the opinion of . . . a treating physician." Lester, 81 F.3d at 831; *see*
14 Pitzer v. Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990) (finding that the nonexamining physician's
15 opinion "with nothing more" did not constitute substantial evidence). However, "[w]here the
16 opinion of the claimant's treating physician is contradicted, and the opinion of a nontreating
17 source is based on independent clinical findings that differ from those of the treating physician,
18 the opinion of the nontreating source may itself be substantial evidence." Andrews, 53 F.3d at
19 1041. Independent clinical findings include "(1) diagnoses that differ from those offered by
20 another physician and that are supported by substantial evidence, or (2) findings based on
21 objective medical tests that the treating physician has not herself considered." Orn, 495 F.3d at
22 632 (internal citations omitted).

23 24 **B. Analysis**

25
26 Plaintiff contends that the ALJ improperly dismissed the opinions of her two treating
27 physicians, Smita Bhatia, M.D., M.P.H., and Jack Gutman, D.O., who began treating plaintiff in
28 2006, and 1998, respectively. (Joint Stip. at 4-5; *see also* A.R. 769 (1/26/2011 - Dr. Gutman

1 states that he has seen plaintiff for treatment 50 times since 1998), 863 (1/18/11 - Dr. Bhatia
 2 states that she has been treating plaintiff from January 20, 2006 through the present).) Plaintiff
 3 also contends that the ALJ improperly ignored the opinion of the State agency non-examining
 4 physician, Dr. Chan. (Joint Stip. at 6.)

5 6 **1. Dr. Bhatia**

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 8 On October 26, 2010, in a "Medical Assessment Of Ability To Do Work-Related Activities
 9 Physical," Dr. Bhatia opined that plaintiff could lift and carry five pounds occasionally and five
 10 pounds frequently; sit for two hours (between 1-33% of the time), stand for one hour (1-33% of
 11 the time), and walk for half an hour (between 1-33% of the time), in an eight-hour work day.
 12 (A.R. 763-64.) On February 1, 2011, Dr. Bhatia completed an "Attending Physician Statement"
 13 indicating the same.² (*Id.* 836-38.)

14
 15 The ALJ gave little weight to Dr. Bhatia's functional assessments for the following reasons:
 16 (1) despite plaintiff's significant complaints of migraines, Dr. Bhatia makes no mention of them;
 17 (2) Dr. Bhatia's opinions indicate that plaintiff would have to lie down or rest for more than half
 18 the work day; (3) Dr. Bhatia found that plaintiff required oxygen for "any physical exertion," which
 19 was inconsistent with plaintiff's description of her activities and "significantly more limited use of
 20 supplemental oxygen" (A.R. 23 (citing *id.* 763, 836, 838)); and (4) in her first assessment of
 21 plaintiff, Dr. Bhatia found plaintiff equally restricted in her left and right upper extremities (*id.* 26
 22 (citing *id.* 764)), "despite evidence of significantly greater limitations on the left (due to plaintiff's
 23 childhood sarcoma)" (*id.* 26 (citing *id.* 686 (noting that Dr. Bhatia found limited function in the left
 24 arm as a result of tumor resection and radiation therapy, with limited range of motion of the left
 25 upper extremity and significantly limited dexterity)). The ALJ also noted that Dr. Bhatia
 26 determined plaintiff was "temporarily or permanently disabled, was unable to return to work in

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 28 ² The latter assessment indicated the percent of the time that could be spent engaging in
 the activity, rather than the number of total hours. (*Compare* A.R. 763 *with id.* 837.)

1 the foreseeable future, should not work, could not sustain work activity, and was unable to work
 2 due to her impairments and medication.” (*Id.* 27 n.3.) The ALJ gave little weight to these
 3 opinions in view of the other inconsistencies mentioned and because they “infringe upon the
 4 discretion of the Commissioner.”³ (*Id.*)

5
 6 The Court does not find these reasons to be specific and legitimate.⁴ First, although Dr.
 7 Bhatia does not specifically mention plaintiff’s migraines in the two functional assessments noted
 8 by the ALJ (A.R. 763-66, 837-38), Dr. Bhatia repeatedly mentions plaintiff’s migraine headaches
 9 in her treating records (*see, e.g., id.* 686, 810, 834, 911). In fact, in other documents in which
 10 Dr. Bhatia discusses plaintiff’s various conditions, she lists myriad conditions, several of which, in
 11 addition to plaintiff’s history of migraines, were not included by Dr. Bhatia as “diagnoses” in the
 12 functional limitation forms (e.g., atypical lobular hyperplasia of left breast; hypercholesterolemia;
 13 carotid artery atherosclerosis; history of subclinical hypothyroidism and thyroid cyst and nodule;
 14 history of mitral valve prolapse; history of intermittent chest pain and palpitations; and history of
 15 osteopenia and Vitamin D deficiency). (*See, e.g., id.*) Dr. Bhatia’s failure to specifically list all of
 16 plaintiff’s conditions in her functional assessments (which asked, “What is this patient’s medical
 17 diagnosis(es)?”) is not a legitimate reason to find that those opinions are, as characterized by the
 18 ALJ, “inconsistent.” (*See id.* 26 (deeming Dr. Gutman’s failure to mention migraines an

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 20 ³ The ALJ also acknowledged, however, that Dr. Bhatia’s opinion that “side effects from
 21 medication could reasonably interfere with the ability to function in the work place” was “a
 conclusion not inconsistent with the evidence in the record.” (A.R. 27 n.3.)

22 ⁴ Defendant’s arguments -- which focus on the number of yearly visits plaintiff made to
 23 Dr. Bhatia (an oncologist); plaintiff’s daily activities; plaintiff’s claim that she could sit for only 30
 24 minutes at a time, notwithstanding her testimony that she believed she could sit through a church
 25 service of an unstated length; plaintiff’s report on November 30, 2010, to one of Dr. Bhatia’s
 26 colleagues that she had no chest pain or shortness of breath”; and Dr. Bhatia’s conservative
 27 treatment of “medication, rest, warm water exercise, diet, [and] yoga” (Joint Stip. at 6-8) -- are
 28 unpersuasive, because the ALJ did not cite these arguments as a reasons for discounting Dr.
 Bhatia’s opinion and the Court is required “to review the ALJ’s decision based on the reasoning
 and factual findings offered by the ALJ -- not post hoc rationalizations that attempt to intuit what
 the adjudicator may have been thinking.” *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d
 1219, 1225 (9th Cir. 2009); *Stout*, 454 F.3d at 1054 (stating that the court is “constrained to
 review the reasons the ALJ asserts” for the denial of benefits and “cannot affirm the decision of
 an agency on a ground that the agency did not invoke in making its decision”) (quoting *Connett*,
 340 F.3d at 874; *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001)).

1 inconsistency, and comparing Dr. Bhatia's failure to mention migraines to Dr. Gutman's failure to
2 do so).)

3
4 The ALJ also states that Dr. Bhatia's opinions suggest that plaintiff would have to lie down
5 or rest for more than half the work day. (A.R. 26.) Although Dr. Bhatia limits plaintiff with regard
6 to sitting, standing, and walking during an eight-hour work day, nowhere in her assessment does
7 Dr. Bhatia state that for the rest of the work day plaintiff needs to be lying down or resting.
8 Accordingly, this is not a specific and legitimate reason to discredit the opinions of treating
9 physician.

10
11 The ALJ finds that Dr. Bhatia's statement that "oxygen was required for 'any physical
12 exertion'" is an overly broad restriction in the light of plaintiff's description of her activities and
13 "significantly more limited use of supplemental oxygen." (A.R. 23 (citing 763, 836, 838).)
14 Preliminarily, the ALJ does not indicate where plaintiff discusses a "more limited use of
15 supplemental oxygen." (*Id.* 23.) The Court's review of the record shows that, other than to
16 briefly mention that when she takes morphine she also has to take oxygen because of her
17 hypoxia, plaintiff did not otherwise testify at the hearing about her use of supplemental oxygen.
18 (*Id.* 52.) In her Pain Questionnaire and supplemental letter, plaintiff indicated that: she needs
19 to stop for her oxygen treatment 3-4 times a week; her oxygen levels sometimes drop
20 unpredictably, but "often after climbing hills or stairs or when I become overheated"; and if she
21 lifts more than ten pounds with both arms and it is warm out, she becomes winded and her
22 oxygen levels drop. (*Id.* 167, 169, 172, 174.) Dr. Bhatia indicated the following in a treatment
23 note:

24
25 [Plaintiff] has had decreased oxygen saturation down to the low 80s and chest
26 tightness and palpitations and increased heart rate on exertion. She has a pulse
27 oximeter at home now, and she manages this with intermittent oxygen therapy.
28

1 (*Id.* 834.) The Court has found nothing in the record to support the ALJ's conclusion that Dr.
2 Bhatia's statement that plaintiff required oxygen "for any physical exertion" was overly broad or
3 that plaintiff had anywhere indicated a "significantly more limited use" of oxygen. Accordingly,
4 this was not a specific and legitimate reason to discount Dr. Bhatia's opinions.

5
6 Finally, the ALJ compares Dr. Bhatia's two assessments, completed several weeks apart,
7 and notes that, despite evidence in the record demonstrating that plaintiff has a more significantly
8 limited range of motion in her left upper extremity than in the right (A.R. 26 (citing *id.* 174-75,
9 306, and hearing testimony)), Dr. Bhatia in the earlier of her assessments indicated the same
10 limitations for plaintiff's right and left extremities (*id.* 764). Thus, in her October 26, 2010,
11 assessment, Dr. Bhatia indicated that, based on plaintiff's severe neuropathy, plaintiff could only
12 occasionally: grasp, reach, finger (fine manipulation); handle (gross manipulation); and feel, and
13 push/pull with either hand. (*Id.*) In a February 1, 2011, disability claim form, Dr. Bhatia assessed
14 only fine finger movements (never for the left; occasionally for the right); hand/eye coordinated
15 movements (occasionally for both right and left); and pushing and pulling (never for the left;
16 occasionally for the right). (*Id.* 837.) Dr. Bhatia again indicated that plaintiff's severe neuropathy
17 supported her opinions, as well as plaintiff's pulmonary dysfunction, GI hypersensitivity, recurrent
18 UTIs, and chronic pain/fatigue. (*Id.* 836.) Any differences in these two assessments, to the
19 extent they are measuring the same tasks and can even be compared, are minimal. (Joint Stip.
20 at 4.) Accordingly, this was not a specific and legitimate reason to discount Dr. Bhatia's opinions,
21 which reflect a treatment relationship spanning more than six years. Remand is thus warranted
22 on this issue.

23 24 **2. Dr. Gutman**

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26 On January 26, 2011, Dr. Gutman completed a form entitled "Medical Assessment Of Ability
27 To Do Work-Related Activities Physical," in which he indicated that, because of plaintiff's
28 neuropathy, plaintiff could: occasionally lift and carry up to seven and a half pounds; sit for two

1 hours; stand for one hour; walk for half an hour during an eight-hour work day; and only
2 occasionally perform fine manipulation with her right and left hand. (A.R. 769-70.) Three weeks
3 later, on February 15, 2011, Dr. Gutman completed a "Disability Claim Form" for Unum, plaintiff's
4 long term disability insurance provider, in which he indicated that plaintiff could: lift and carry ten
5 pounds frequently, 20 pounds occasionally, and never more than 25 pounds; sit, stand, and walk
6 between 1/3 and 2/3 of the time; and frequently perform fine manipulation with her right hand
7 but never with her left hand. (*Id.* 853-54.) Unlike his January 26, 2011 opinion, Dr. Gutman's
8 February 15, 2011 opinion was not limited to identifying plaintiff's abilities and limitations during
9 an eight-hour workday.

10
11 The ALJ found that Dr. Gutman's assessments of plaintiff's limitations were not credible,
12 because he suggested that plaintiff would have to lie down or rest for four and a half hours during
13 an eight-hour work day and this suggestion was not consistent with plaintiff's own statements.
14 (A.R. 26 (citing *id.* 769-70).) However, nowhere in his opinions does Dr. Gutman state that
15 plaintiff needs to lie down or rest for four hours of an eight-hour work day. Instead, he indicates
16 that plaintiff retains the capacity to: sit, stand, and walk between 34% and 66% of the time
17 generally; and, in the context of an eight-hour workday, sit for two hours, stand for one hour, and
18 walk for half an hour. (*Id.* 769-70.) Accordingly, the ALJ's finding that Dr. Gutman was not
19 credible, because he suggested that plaintiff would have to lie down and rest for four and a half
20 hours during an eight-hour workday was not supported by substantial evidence.

21
22 The ALJ also found Dr. Gutman's assessments less than credible because he did not include
23 migraines among his diagnoses in either assessment. (A.R. 26.) Again, the ALJ's finding is not
24 supported by substantial evidence. On the first page of his February 15, 2011 assessment, Dr.
25 Gutman includes migraines in a list of plaintiff's symptoms. (*Id.* 852.) Accordingly, the ALJ's
26 second reason for discrediting Dr. Gutman's opinions was not a legitimate reason supported by
27 substantial evidence.

1 The ALJ further noted that Dr. Gutman's opinion in his January 26, 2011 assessment that
2 plaintiff is limited to occasional fine manipulation with her right, as well as her left, hand was not
3 supported by the objective findings in the record regarding plaintiff's right upper extremity. (A.R.
4 26 (citations omitted).) Dr. Gutman's limitation to occasional fine manipulation with plaintiff's
5 right, as well as her left, hand was justified by Dr. Gutman based on plaintiff's neuropathy -- a
6 condition amply demonstrated in the record. Accordingly, this was not a specific and legitimate
7 reason to discount Dr. Gutman's opinion.

8
9 Lastly, the ALJ discounted Dr. Gutman's opinions because of inconsistencies between Dr.
10 Gutman's January 26, 2011 and February 15, 2011 assessments. (A.R. 26.) Specifically, in his
11 January 26, 2011 assessment of plaintiff's ability to do work-related activities, Dr. Gutman found
12 that plaintiff could stand for no more than one hour and walk no more than 1/2 hour in an eight-
13 hour workday. (*Id.* 769-70.) Three weeks later, on a "Disability Claim Form," Dr. Gutman
14 indicated that plaintiff could generally stand and/or walk between 34% and 66% of the time (or
15 between 2.72 and 5.28 hours). (A.R. 26 (citing *id.* 769-70, 853).) It is not clear from the record,
16 however, that these inconsistencies reflect on Dr. Gutman's credibility. Whereas Dr. Gutman's
17 first opinion concerns plaintiff's ability to do work-related activities, his second opinion concerns
18 plaintiff's abilities more generally, and the record consistently shows that plaintiff's conditions are
19 more difficult to manage and, as a result, more disabling when she is working eight hours a day
20 than when she is not working. (*Se e.g.*, A.R. 912 ("[S]ince being placed on fully disability,
21 [plaintiff's] health status improved; however her symptoms become markedly exacerbated when
22 she over-exerts herself, such as would be required should she return to her work duties . . . her
23 work has had a significantly detrimental impact on her health status."), 852 (Dr. Gutman opines
24 that plaintiff's treatment plan includes a reduced workload); *compare also id.* 54, 171, 172
25 (plaintiff's statements about her abilities to help around the house while not working) *with id.* 62,
26 171, 172 (plaintiff's statements about her abilities to help around the house while she was
27 working).) Accordingly, the fact that Dr. Gutman gave two different answers to two different
28 questions was not a legitimate reason supported by substantial evidence for discrediting Dr.

1 Gutman's opinions.⁵ Further, to the extent that the inconsistencies created ambiguity, the ALJ was
 2 required to seek clarification. See Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001)
 3 (ALJs have an independent duty to fully and fairly develop the record, which is triggered by
 4 ambiguous evidence or by a record that is inadequate to allow for proper evaluation of the
 5 evidence). Accordingly, the ALJ shall reevaluate Dr. Gutman's opinion on remand and, if
 6 necessary, take appropriate actions to develop the record.

7 8 **3. Dr. Chan**

9
 10 Dr. Chan found plaintiff could lift ten pounds occasionally and frequently; could stand
 11 and/or walk "*at least two hours*" in an eight-hour workday; and could sit about six hours in an
 12 eight-hour workday. Plaintiff notes that Dr. Chan's limitation to lifting ten pounds was consistent
 13 with the lifting limitations of her treating physicians. (Joint Stip. at 6.) The ALJ gave Dr. Chan's
 14 assessment "little weight," because Dr. Chan "overstates the claimant's standing and walking
 15 abilities." (A.R. 27 (citing *id.* 692-97).)

16
 17 The stand/walk options Dr. Chan could have selected on the form he completed were: (1)
 18 "less than 2 hours in an 8-hour workday"; (2) "at least 2 hours in an 8-hour workday"; (3) "about
 19 6 hours in an 8-hour workday"; and (4) "medically required hand-held assistive device is
 20 necessary for ambulation." (A.R. 693.) Given these options, the option Dr. Chan chose -- "at
 21 least 2 hours in an 8-hour workday" -- would seem to imply that plaintiff had the ability to stand
 22 and/or walk for at least two but less than six hours in an eight-hour workday. Dr. Chan indicated
 23

24 ⁵ Further, even if the Court were to accept the legitimacy of the ALJ's interpretation of the
 25 inconsistency between Dr. Gutman's opinions, it could not, in and of itself, provide a sufficient
 26 basis for discrediting Dr. Gutman's opinion. Cf. Burrell v. Colvin, 775 F.3d 1133, 1139-40 (9th Cir.
 27 2014) (in view of the record as a whole and the ALJ's other errors, the ALJ's articulation of "one
 28 weak reason" for discrediting the plaintiff was not a sufficient basis for rejecting the plaintiff's
 testimony); see also Lingenfelter, 504 F.3d at 1035 ("we must consider the entire record as a
 whole, weighing both the evidence that supports and the evidence that detracts from the
 Commissioner's conclusion and may not affirm simply by isolating a specific quantum of
 supporting evidence").

1 that his conclusions are not “significantly different” from those of the treating physicians. (*Id.*
 2 696.) However, his conclusion that plaintiff can stand and/or walk for more than two hours in an
 3 eight-hour workday is inconsistent with the opinion of Dr. Bhatia, who opined that plaintiff can
 4 stand and/or walk for no more than one hour in an eight-hour workday (*id.* 763), and with the
 5 January 2011 opinion of Dr. Gutman that plaintiff can neither stand nor walk for more than one
 6 hour in an eight-hour workday (*id.* 769). The inconsistency between Dr. Chan’s opinion and the
 7 opinions of plaintiff’s treating physicians was a specific and legitimate reason for discrediting his
 8 opinion. See Garrison, 759 F.3d at 1012 (discussing hierarchy of physicians’ opinions); see also
 9 20 C.F.R. § 404.1527(c).

10 11 **II. THE ALJ’S ASSESSMENTS OF PLAINTIFF’S CREDIBILITY AND RFC.**

12
13 In her other two claims, plaintiff contends that the ALJ erred in determining plaintiff’s RFC,
 14 because: (1) she did not properly evaluate plaintiff’s subjective complaints of pain (Joint Stip.
 15 at 18-20, 22); and (2) she did not take into account the non-exertional limitations caused by
 16 plaintiff’s pain and medication side effects, which affect her ability to perform her past work as
 17 a psychologist (*id.* at 13-15, 17). As these two claims are closely related, the Court considers
 18 them together.

19 20 **A. Plaintiff’s Credibility**

21
22 Once a disability claimant produces objective medical evidence of an underlying impairment
 23 that is reasonably likely to be the source of claimant’s subjective symptom(s), all subjective
 24 testimony as to the severity of the claimant’s symptoms must be considered. Moisa v. Barnhart,
 25 367 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991); see also
 26 20 C.F.R. § 404.1529(a) (explaining how pain and other symptoms are evaluated). “[U]nless an
 27 ALJ makes a finding of malingering based on affirmative evidence thereof, he or she may only find
 28 an applicant not credible by making specific findings as to credibility and stating clear and

1 convincing reasons for each.” Robbins, 466 F.3d at 883. The factors to be considered in weighing
2 a claimant’s credibility include: (1) the claimant’s reputation for truthfulness; (2) inconsistencies
3 either in the claimant’s testimony or between the claimant’s testimony and her conduct; (3) the
4 claimant’s daily activities; (4) the claimant’s work record; and (5) testimony from physicians and
5 third parties concerning the nature, severity, and effect of the symptoms of which the claimant
6 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R. §
7 404.1529(c).

8
9 Here, the ALJ concluded that “after careful consideration of the evidence, . . . [plaintiff]’s
10 medically determinable impairments could reasonably be expected to cause the alleged
11 symptoms.” (A.R. 28.) The ALJ cited no evidence of malingering by plaintiff but determined that
12 plaintiff’s “statements concerning the intensity, persistence and limiting effects of [her] symptoms
13 are not credible to the extent they are inconsistent with the above [RFC] assessment.” (*Id.*)
14 Accordingly, the ALJ’s reasons for finding that plaintiff was not credible with respect to her
15 subjective symptom and pain testimony must be “clear and convincing.”

16
17 Plaintiff alleges that she experiences pain in her left arm, neck, legs, and bones; migraine
18 headaches; pins and needles in her feet; and fatigue. (A.R. 26 (citations omitted).) Specifically,
19 plaintiff stated that she: has migraine headaches twice a month with each one lasting two to five
20 days (*id.* 58); experiences constant pain that makes it difficult to concentrate and attend to tasks
21 (*id.* 57, 169), daily nausea, and inability to eat solid foods (*id.* 168); always feels like she has a
22 bladder infection and, when she was working, had to use the bathroom every 30-60 minutes and
23 would experience “spasms” trying to urinate (*id.* 60); and has good days and bad days, with four
24 to six days a month being so bad that she is confined to bed all day (*id.* 63). She stated that she
25 can lift no more than ten pounds with both arms, sit for 30 to 40 minutes at a time, and stand
26 without support for five minutes. (*Id.* 175.) She testified that she has difficulty sitting and,
27 although she could sit through a church service, would have difficulty sitting through a funeral
28 service and would be unable to sit through a movie without getting up once or twice. (*Id.* 62.)

1 She testified that, when she was working full-time, she could not participate in her household life
2 and relied on her husband to do all the cooking, cleaning, pet care, grocery shopping, laundry,
3 etc. (*Id.* 62)

4
5 Plaintiff testified that she takes Klonopin every night, Topamax daily for migraine
6 prevention and pain relief, Indocin most days, and, for breakthrough pain, including migraines,
7 she takes Vicodin, morphine, and/or ketamine. (A.R. 50-51.) These medications make her
8 forgetful, groggy, less articulate and impair her memory and judgment. (*Id.* 50, 174.) The
9 morphine precludes her from driving or thinking coherently and worsens her hypoxia, which
10 requires oxygen. (*Id.* 50.) Plaintiff similarly stated that the ketamine helps "when the pain spirals
11 and flares up it feels like my legs are on fire, and like my muscles are being pulled from the bone,"
12 but it "creates perceptual alterations, which alter my ability to drive, be in crowds, lights, etc."
13 (*Id.* 173.)

14
15 The ALJ rejected plaintiff's testimony regarding the severity of her pain symptoms and
16 medication side effects, because: (1) plaintiff's subjective complaints and alleged limitations are
17 not corroborated by the evidence of record; (2) plaintiff's ability to perform a "wide variety of
18 activities indicates that [she] also has the ability to perform appropriate work activities on an
19 ongoing and daily basis"; and (3) plaintiff was "able to work at above substantial gainful level
20 activities after her alleged onset date." (A.R. 26.)

21 22 **1. Objective Medical Evidence**

23
24 The ALJ cited her reasons for discrediting plaintiff's treating physicians as the basis for her
25 determination that the objective medical evidence did not support plaintiff's subjective symptom
26 testimony. (*See* A.R. 28.) However, as explained above, the reasons the ALJ cited for discrediting
27 plaintiff's treating physicians were not specific and legitimate reasons supported by substantial
28 evidence.

1 Further, rather than undermining plaintiff's subjective symptom testimony, the 900-page
2 record contains multiple reports, assessments, and notes from myriad specialists, in addition to
3 plaintiff's two treating physicians, which overwhelmingly support plaintiff's allegations of both
4 physical and mental impairments. For example, the record includes a four-page letter from Dr.
5 Bhatia, dated June 15, 2012 -- over six years after Dr. Bhatia began treating plaintiff -- that
6 describes plaintiff's impairments and limitations in detail. In part, Dr. Bhatia's letter states:

7
8 [Plaintiff's] very significant neuropathy, chronic severe neuropathic pain, and
9 migraine headaches require the administration of numerous analgesics for pain
10 management in doses that result in impaired concentration and reaction time, and
11 an impaired ability to render the considered judgments required to diagnose and
12 treat patients seeking professional psychological care. Additionally, [she]
13 experiences significant urinary frequency, urgency, and bladder pain as a result of
14 her interstitial cystitis and neurogenic bladder, requiring multiple medications and
15 frequent voiding that necessitates excusing herself during sessions with clients,
16 significantly interrupting the flow and dynamic of psychotherapy sessions

17
18 [Plaintiff] also has chronic fatigue and limited exercise tolerance as a result of her
19 restrictive lung disease and exercise induced pulmonary hypertension. . . . She also
20 suffers from gastrointestinal hypomotility as a result of her neuropathy, with
21 associated delayed gastric emptying and constipation, impairing her ability to
22 consume many common foods, and also limiting her ability to maintain adequate
23 nutritional intake. She has limited function in her left arm as a result of tumor
24 resection and radiation therapy, with limited range of motion and significantly
25 limited dexterity. . . . She requires oxygen for any physical exertion above baseline
26 activities, due to her exercise-induced pulmonary hypertension and related low
27 oxygen saturation levels (which drop below 90% with exertion). Her neuropathy
28 predisposes her to pre-syncope gait instability and the inability to sweat normally,

1 resulting in heat and cold intolerance and impaired temperature stability. She
2 benefits from warm-water exercise, yoga, and meditation to control this. She also
3 has significant chronic pain requiring multiple medications that impair her judgment,
4 concentration, and reaction time and prevent her from practicing or teaching clinical
5 psychology

6
7 [S]ince being placed on full disability, [plaintiff's] day-to-day health status improved;
8 however, her symptoms become markedly exacerbated when she over-exerts
9 herself, such as would be required should she return to her work duties. Therefore,
10 I have strongly recommended that she refrain from working, as her work has had
11 a significantly detrimental impact on her health status. Of note, her health status
12 initially improved and then stabilized following her placement on fully disability
13 status, which allows her the opportunity to obtain adequate rest, take medication
14 as needed for symptom control, engage in yoga, warm water exercise, and
15 consumption of a healthy diet with adequate caloric intake, and in general manage
16 her chronic health conditions in a way that optimizes her health to the extent
17 possible given the severity of these conditions.

18
19 Based on my experience caring for many childhood cancer survivors who have
20 received similar therapy and based on [plaintiff's] entire medical evaluation and my
21 observations of her medical status over time, I must conclude that [her] prognosis
22 is guarded. The best that can be hoped for, with proper rest and medical
23 management, is stabilization of her current health status. Unfortunately, it is very
24 unlikely that her multiple adverse sequelae related to her cancer treatment will
25 improve over time, and in fact these health conditions are typically chronic and
26 progressive. I have attached citations from the medical literature in support of my
27 conclusions.
28

1 (A.R. 909-912.)
2

3 In sum, the objective medical evidence corroborated plaintiff's description of her symptoms
4 and medication side effects, and the ALJ's flawed assessment of the copinions of plaintiff's treating
5 physicians was not a clear and convincing reason for finding plaintiff's testimony less than
6 credible. Accordingly, the ALJ erred in citing the objective medical evidence as a reason for
7 discounting plaintiff's testimony.
8

9 **2. Daily Activities**

10
11 The ALJ also cited plaintiff's activities of daily living as inconsistent with plaintiff's testimony.
12 Specifically, the ALJ noted that plaintiff: "is active with yoga;" reads; watches television; uses a
13 computer; does laundry; prepares simple meals; washes dishes; handles bills; deadheads flowers;
14 takes occasional walks; exercises at the gym or in a pool; drives; shops with a friend; does
15 errands, including getting pet food from the farm supply; goes to the library; takes the dry
16 cleaning; and goes to the nursery. (A.R. 28 (citations omitted).) The ALJ concluded that the
17 ability to perform these activities "indicates that [plaintiff] also has the ability to perform
18 appropriate work activities on an ongoing and daily basis." (*Id.*)
19

20 However, the record shows that plaintiff does not perform all of these activities daily, does
21 not perform household chores by herself, and performs the limited exercises identified by the ALJ
22 as part of the treatment plan prescribed by her treating physicians, Drs. Gutman and Bhatia. For
23 instance, although plaintiff has no problem putting the clothes in the washing machine or moving
24 them to the dryer, she explained that moving the clothes out of the dryer before they wrinkle,
25 stooping to the dryer to lift and fold the wash is tiring, and she needs to sit down for five minutes
26 after undertaking such activity. (A.R. 172). Although she enjoys cooking, chopping, lifting pans,
27 and washing heavy dishes drains her and leaves her unable to do much else, so she cooks simple
28 meals, one item at a time, and her husband helps with the dishes. (*Id.* 171.) Although plaintiff

1 has a gardener doing yard work, once a month she clips dead flowers, and her husband sweeps
 2 them up. (*Id.* 177.) She goes to the gym for pool therapy exercises (*id.* 164); shops biweekly
 3 with a friend who helps with the cart (*id.* 172); when she shops for pet food, she takes items one
 4 at a time and asks for help lifting them into the car (*id.*); and her husband takes care of the
 5 animals (*id.*). Finally, plaintiff testified that while she was working, she was unable to do any of
 6 the household chores or shopping, and it was only after she stopped working that she was able
 7 to “participate in some meaningful way in . . . household life.” (*Id.* 62.)

8
 9 An ALJ may rely on a claimant’s daily activities to support an adverse credibility
 10 determination when those activities: (1) “contradict [claimant’s] other testimony”; or (2) “meet
 11 the threshold for transferable work skills.” Orn, 495 F.3d at 639. As a result, a plaintiff’s
 12 credibility may be discounted if he or she “is able to spend a substantial part of his or her day
 13 performing household chores or other activities that are transferable to a work setting.” Smolen
 14 v. Chater, 80 F.3d 1273, 1284 n.7 (9th Cir. 1996). A claimant, however, need not be “utterly
 15 incapacitated to be eligible for benefits . . . and many home activities are not easily transferable
 16 to what may be the more grueling environment of the workplace, where it might be impossible
 17 to periodically rest or take medication.” Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989) (internal
 18 citations omitted); Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984) (an ability to engage
 19 in some physical activities is not necessarily inconsistent with a finding of disability).

20
 21 Here, there is no evidence plaintiff spends a “substantial part” of her day performing some
 22 or all of these activities. Moreover, the ALJ fails to specify how plaintiff’s ability to occasionally
 23 do a few household chores translates into the ability to perform full-time work and renders
 24 plaintiff’s testimony about her pain and symptoms unworthy of belief. See Vertigan v. Halter, 260
 25 F.3d 1044, 1050 (9th Cir. 2001) (noting that the “mere fact that a plaintiff has carried on certain
 26 daily activities, such as grocery shopping, driving a car, or limited walking for exercise, does not
 27 in any way detract from her credibility as to her overall disability”); Smolen, 80 F.3d at 1283 n.7
 28 (“The Social Security Act does not require that claimants be utterly incapacitated to be eligible for

benefits, and many home activities may not be easily transferable to a work environment where it might be impossible to rest periodically or take medication.”). Accordingly, plaintiff’s daily activities did not provide a clear and convincing reason for discounting plaintiff’s subjective complaints.

3. Work After Alleged Onset Date

The ALJ discounted plaintiff’s credibility because “while she states she was provided with special work conditions, [plaintiff] was able to work at above substantial gainful level activities after her alleged onset date.” (A.R. 28 (citations omitted).) Specifically, the ALJ found that plaintiff engaged in substantial gainful activity after her alleged onset date, from February 16, 2010, through May 14, 2010. (*Id.* 22). The ALJ also determined that from May 15, 2010, through the date of the decision, plaintiff had not engaged in substantial gainful activity. (*Id.*)

If a plaintiff can engage in substantial gainful activity, she is not disabled within the meaning of the Social Security Act. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999); 20 C.F.R. § 404.1571. Substantial gainful activity is work activity that “involves doing significant physical or mental activities” on a full-or part-time basis, and “is the kind of work usually done for pay or profit.” 20 C.F.R. § 404.1572. Earnings that exceed a certain amount, as specified in the regulations, create the presumption of substantial gainful activity. 20 C.F.R. §§ 404.1574, 404.1575(c); *see also Keyes v. Sullivan*, 894 F.2d 1053, 1056 (9th Cir. 1990); Lewis, 236 F.3d at 515-16. The plaintiff may rebut this presumption with evidence of her inability to perform the job well, without special assistance, or for only brief periods of time.⁶ Keyes, 894 F.2d at 1056; *see also* 20 C.F.R. § 404.1573.

Special conditions are those that “take into account [the] impairment.” 20 CFR § 404.1573.

⁶ Plaintiff does not contest the ALJ’s finding that plaintiff engaged in substantial gainful activity between February 16, 2010, and May 14, 2010.

1 Factors that may show a plaintiff worked under such conditions may include the following: (1)
2 she required and received special assistance from other employees in performing work; (2) she
3 was allowed to work irregular hours or take frequent rest periods; (3) she was provided with
4 special equipment or was assigned work especially suited to the impairment; (4) she was able to
5 work only because of specially arranged circumstances, such as persons preparing for or getting
6 plaintiff from work; (5) was permitted to work at a lower standard than other employees; or (6)
7 she was given the opportunity to work due to family relationships, past association with an
8 employer or the employer's concern for the plaintiff's welfare. *Id.* At this and at all stages of the
9 sequential evaluation, the ALJ must make full and detailed findings of fact that are essential to
10 the ALJ's conclusion so that a reviewing court may determine the basis for the decision and
11 whether substantial evidence supports the Commissioner's decision. Lewin v. Schweiker, 654 F.2d
12 631, 634-35 (9th Cir. 1981).

13
14 In her testimony and other documents, plaintiff explains that from February 1, 2010,
15 through February 15, 2010, she was working full time. (A.R. 136.) On February 4, 2010, she was
16 prescribed supplemental oxygen, and it arrived on February 12, 2010. (*Id.* 131, 132, 171).
17 However, plaintiff found that rolling the portable oxygen tank to work was "extremely fatiguing,"
18 and on February 15, 2010, she and her physician made the decision that working was not
19 advisable. (*Id.* 131, 169, 171.) From February 16, 2010, therefore, she started working part-
20 time, seeing 15 clients per week, while reducing her client load and closing out files. (*Id.* 132,
21 171.) In May 2010, plaintiff was working approximately eight hours per week, seeing eight to 12
22 clients, some of whom she was court ordered to see. (*Id.* 134, 137.) As of July 2010, she was
23 working only five hours per week. (*Id.* 171; Joint Stip. at 19.) Plaintiff asserts that, during this
24 time, she "needed and got special help from other workers in doing [her] job"; was "given special
25 equipment or . . . work that was suited to [her] condition"; was allowed to work at a lower
26 standard of productivity; worked for a relative, her husband; worked irregular hours or took
27 frequent rest periods; worked fewer hours; got different pay; and although the other therapists
28 in her practice did their own scheduling, a secretary was hired to help her. (A.R. 134-35.)

1 Plaintiff also states that she was not making enough from her practice to cover her half of the
2 expenses, including rent and malpractice insurance, but she drew enough salary to be able to
3 cover the bills (*Id.* 137, 157.) She also indicated that some of the income she received in 2010
4 was from patients' outstanding bills from an earlier time period. (*Id.* 48.)
5

6 While the regulations provide that a claimant's work history is relevant in determining
7 whether he or she has engaged in substantial gainful activity (*see, e.g.*, 20 C.F.R. § 404.1571),
8 the Ninth Circuit has made clear that a claimant should not be penalized for attempting to work
9 due to economic necessity, notwithstanding the claim that he or she was disabled at that time.
10 Lingenfelter v. Astrue, 504 F.3d 1028, 1037 (9th Cir. 2007) ("It does not follow from the fact that
11 a claimant tried to work for a short period of time and, because of his impairments, *failed*, that
12 he did not then experience pain and limitations severe enough to preclude him from maintaining
13 substantial gainful employment."); *see also* Perkins v. Astrue, 535 F. Supp. 2d 14560, 1453 (9th
14 Cir. 1984) (adverse credibility determination supported by finding that claimant engaged in
15 substantial gainful activity after the alleged onset date). Indeed, the Ninth Circuit has suggested
16 "that similar evidence that a claimant tried to work and failed actually supported his allegations
17 of disabling pain." *Id.* (citing Fair, 885 F.2d at 604); *see also* Rosario v. Sullivan, 875 F. Supp.
18 142, 146 (E.D.N.Y. 1995) (holding that substantial evidence did not support the ALJ's decision that
19 claimant was not disabled, in part because claimant's unsuccessful work attempt weighed in favor
20 of a disability finding).
21

22 Here, the record indicates that, in early 2010, Petitioner worked part-time and drew a
23 salary above what she was bringing into the corporation owned by her and her husband in order
24 to pay her share of the bills. (A.R. 137, 157.) The record also demonstrates that, in February
25 2010, she stopped taking any new patients and started closing her practice. (*Id.* 157.) She
26 explained that this took time, because she had to refer her clients to other therapists and "also
27 manage [her] custody cases." (*Id.* 137, 157.) She also provided information regarding special
28 accommodations that were made during 2010 to enable her to close out her practice. (*Id.* 134-

35.) Plaintiff ultimately stopped working altogether as a result of her impairments and the side effects caused by her medication, which include grogginess, memory and concentration problems, and difficulty thinking.

Although the ALJ briefly mentioned that plaintiff had received "special work conditions" during 2010, when she worked at substantial gainful levels after her alleged onset date, the ALJ did not acknowledge, in using this as a factor to discredit plaintiff's complaints, plaintiff's testimony: that at least a portion of her salary was motivated by economic necessity; the nature and extent of the accommodations provided enabled plaintiff to close out her practice in a professional manner; and that plaintiff ultimately terminated her employment due to her impairments. Plaintiff did not try to hide the fact that she received a salary during this period or make inconsistent statements regarding her work history. Instead, she admitted that she continued working part-time to transition her clients to other therapists without abandoning them.

On remand, the ALJ should take these and any other relevant factors into account in making her credibility determination. The ALJ may not use plaintiff's part-time work between February 16, 2010, and May 14, 2010, as the sole basis for finding plaintiff's testimony not credible and must either credit plaintiff's subjective symptom testimony or provide clear and convincing reasons why plaintiff's testimony is not credible.

B. Assessment Of Plaintiff's RFC

Plaintiff also faults the ALJ's RFC assessment for failing to take into account the non-exertional limitations caused by plaintiff's pain and medication side effects, which affect her ability to perform her past work as a psychologist. (Joint Stip. at 13-15, 17-18.) As stated above, there was evidence in both plaintiff's testimony and the records from plaintiff's treating physicians that: plaintiff's constant pain and multiple medications make her forgetful, groggy, less articulate, and impair her memory, concentration, judgment, and ability to attend to tasks; the morphine

1 prescribed for her precludes her from driving or thinking coherently and worsens her hypoxia; and
2 the ketamine prescribed for her creates perceptual disturbances. An ALJ is required to consider
3 all of the limitations imposed by a claimant's limitations, even those that are not severe.
4 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008). "Even though a
5 non-severe `impairment standing alone may not significantly limit an individual's ability to do basic
6 work activities, it may -- when considered with limitations or restrictions due to other impairments
7 -- be critical to the outcome of a claim.'" *Id.* (quoting Social Security Ruling 96-8p (1996)).
8 Where the ALJ has properly considered all of the limitations for which there is record support,
9 however, the ALJ's RFC determination will not be overturned so long as the ALJ applied the correct
10 legal standard and the RFC assessment is supported by substantial evidence. See *Bayliss v.*
11 *Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).

12
13 The ALJ found that plaintiff's pain, medication side effects, and somatoform disorder
14 precluded plaintiff from work at unprotected heights, jobs requiring hypervigilance, and jobs in
15 which she would responsible for the safety of others. (See A.R. 28 ("In light of the claimant's
16 combination of physical impairments as well as the side effects from her extensive medication
17 regimen [and somatoform pain disorder], the limitations described in the [RFC] are reasonable
18 and well supported.").) However, the record contains substantial evidence that plaintiff's mental
19 limitations are significantly more extensive than the ALJ acknowledged in her assessment of
20 plaintiff's RFC. In particular, the ALJ failed to include any limitations addressing plaintiff's
21 deficiencies in memory, concentration, and judgment, despite plaintiff's testimony and her treating
22 physician's statements that, as a result of her impairments, pain, and medications, plaintiff was
23 forgetful, had difficulty attending to tasks (particularly while working eight-hour days), and had
24 trouble concentrating on her clients. Accordingly, on remand, the ALJ shall address all of plaintiff's
25 non-exertional limitations arising from plaintiff's physical pain and medication side effects in her
26 assessment of plaintiff's RFC.

III. Remand Is Required.

The decision whether to remand for further proceedings or order an immediate award of benefits is within the district court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Under the credit-as-true rule, a district court should remand for an award of benefits when the following three conditions are satisfied: "(1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand." *Garrison*, 759 F.3d at 1020. The third of these conditions "incorporates . . . a distinct requirement of the credit-as-true rule, namely that there are no outstanding issues that must be resolved before a determination of disability can be made." *Id.* n.26; *see also Harman*, 211 F.3d at 1179-81 (where there are outstanding issues that must be resolved before a determination of disability can be made, and it is not clear from the record that the ALJ would be required to find the claimant disabled if all the evidence were properly evaluated, remand is appropriate).

As indicated above, the Court has found that reversible error occurred. Because outstanding issues must be resolved before a determination of disability can be made, and it is not entirely clear from the record that the ALJ would be required to find plaintiff disabled if all the evidence were properly evaluated, remand is appropriate.⁷

On remand, the ALJ must give the opinions of Drs. Bhatia and Guzman, plaintiff's treating physicians, their deserved weight or give legally sufficient reasons for not doing so. The ALJ must also credit plaintiff's subjective symptom testimony or provide clear and convincing reasons why

⁷ The record does, however, raise serious questions about whether an individual with plaintiff's multiple, significant disabilities and severe medication side effects could perform her past relevant work or any other work on a sustained eight-hour-a-day/40 hours per week basis.

1 plaintiff's testimony is not credible. Finally, the ALJ also must discuss any non-exertional
2 limitations caused by plaintiff's pain and/or medication side effects.

3
4 **CONCLUSION**

5
6 Accordingly, for the reasons stated above, IT IS ORDERED that the decision of the
7 Commissioner is REVERSED, and this case is REMANDED for further proceedings consistent with
8 this Memorandum Opinion and Order.

9
10 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this
11 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for defendant.

12
13 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

14
15 DATED: March 31, 2015

16 
17 MARGARET A. NAGLE
18 UNITED STATES MAGISTRATE JUDGE
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